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IN THE

Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's businesses, including cases construing federal employment statutes and regulations of the Department of Labor ("Department"). *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Auer v. Robbins*, 519 U.S. 452 (1997).

The Chamber has long been a strong advocate of national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient business operations, especially in the area of employer/employee relations, and protects businesses against the costs and risks of navigating a maze of inconsistent interpretations of federal laws.

The question presented in this case–namely whether, despite the Department's contrary interpretation, a Department regulation prohibits employees from retrospectively releasing claims under the Family Medical Leave Act (FMLA) without the approval of the Department or a federal court–directly implicates the Chamber's interest in a predictable and uniform federal legal scheme. Because the Fourth Circuit's decision, which is in conflict with decisions of other courts of appeals permitting unsupervised releases of FMLA claims, *see Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Halverson v. Boy Scouts of Am.*, No. 99-5021, 2000 WL 571933 (6th Cir. May 3, 2000); *Schoenwald v. Arco Alaska, Inc.*, No. 98-35195, 1999 WL 685954 (9th Cir. Aug. 30, 1999), will have far-reaching and disastrous implications for countless businesses that depend upon the certainty, predictability, and uniformity of federal law, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice, and have consented to the filing, of this *amicus* brief, and their consent letters are on file with the Clerk's office.

SUMMARY OF ARGUMENT

This case poses the important, recurring national question whether employees may execute valid and binding FMLA releases. Specifically, 29 C.F.R. 825.220(d) provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). The Department reasonably interpreted this regulation as reflecting the well-established distinction between a forward-looking "right" and a backward-looking "claim," *see, e.g., DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir. 1995), explaining: "[S]ection 220(d) bars only the prospective waiver of FMLA rights, not the settlement of FMLA claims based on past conduct." Br. for the Secretary of Labor as *Amicus Curiae* In Support of Defendant-Appellee's Petition For Rehearing En Banc, at 4, *Taylor v. Progress Energy, Inc.*, No. 04-1525 (4th Cir. July 16, 2007) [hereinafter "DOL Brief I"]. The Fourth Circuit, however, rejected the Department's interpretation of its own regulation, instead holding that Section 220(d) "prohibits both the prospective and retrospective waiver of any FMLA right . . . unless the waiver has the prior approval of the DOL or a court." Pet. App. 31a. The question before this Court, therefore, is whether, contrary to the Department's own position, Section 220(d) precludes employees from releasing their FMLA claims without Department or court approval.

As the petition explains, the traditional reasons for granting certiorari are clearly present here: The decision implicates a split among the federal courts of appeals concerning an important and recurring question of federal law. But *amicus* wishes to

highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now. In particular, the Fourth Circuit's rule, if allowed to stand, will undermine tens (if not hundreds) of thousands of releases entered into between employers and employees as part of reductions in force, private settlements, and voluntary separation programs. In so doing, it will impose significant and entirely unnecessary costs on the federal government, the judiciary, employers, and indeed, the very employees whom the Fourth Circuit's rule purports to protect. This result simply cannot be justified by the legal rationale asserted by the Fourth Circuit–a rationale that, as demonstrated below, is inconsistent with the text of Section 220(d), the Department's official interpretation and historical practice, and indeed, the Fourth Circuit's own reasoning in this case.

Accordingly, this Court should grant certiorari now to address the circuit split and to mitigate the enormous costs that the Fourth Circuit's rule will impose on the national economy if left uncorrected.

ARGUMENT

I. THE DECISION BELOW CREATES SUBSTANTIAL UNCERTAINTY FOR BUSINESSES AND EMPLOYEES AND IMPOSES UNNECESSARY COSTS ON THE NATIONAL ECONOMY.

The Fourth Circuit's rule throws into legal limbo tens (if not hundreds) of thousands of validly executed releases because there is currently no mechanism in place for such releases to be approved. Moreover, the Fourth Circuit's holding significantly

increases the costs of such releases, to the detriment of both employers *and* employees. These harms are exacerbated by the circuit split, since many employers, including many of the Chamber's members, are national corporations that operate in the Fourth, Fifth, and other Circuits. Accordingly, this Court's immediate intervention is necessary to prevent the harm that the Fourth Circuit's rule would impose on employers, employees, and the national economy.

1. Each year, literally thousands of businesses and their employees voluntarily enter into releases identical to the one at issue in this case. For example, businesses commonly elect to ease the financial impact of reductions in force by offering severance benefits to separated employees. Because, in the absence of a preexisting contractual obligation, businesses are not legally obligated to provide these benefits, they understandably request that employees who voluntarily accept such benefits provide valuable consideration in return. Ordinarily, the one thing of value that an outgoing employee can provide is a general release of all claims against the employer. It is thus standard practice for employers to condition severance benefits on the execution of such releases as part of severance agreements with separated employees. *See* ETHAN LIPSIG & MARY C. DOLLARHIDE, DOWNSIZING 129 (1996) ("It normally is imprudent for an employer to pay significant severance or exit incentive benefits to employees unless, in exchange for those benefits, the employees execute releases of any claims they may have against the employer and related parties.").

Department statistics bear out the breadth of this standard business practice. The Department's Bureau of Labor Statistics recently reported that, in the 2006 calendar year, businesses took 13,998 "mass layoff events," defined as layoffs of 50 or more employees. U.S. Dep't of Labor, Bureau of Labor Statistics, Mass Layoffs In December 2006 And Annual Totals For 2006, at *3 (Jan. 24, 2007), *available at* ftp://ftp.bls.gov/pub/news.release/History/mmls.01242007.news (last visited Nov. 19, 2007). These events resulted in the separation of almost 1.5 million employees. *Id.* In September 2007 alone, businesses took 1,271 "mass layoff actions, seasonally adjusted," affecting a total of 123,656 employees. U.S. Dep't of Labor, Bureau of Labor Statistics, Mass Layoff Statistics, *available at* http://www.bls.gov/mls/home.htm (last visited Nov. 19, 2007). Even assuming conservatively that just ten percent of these "mass layoff events" involved severance agreements with general releases, this means that there were almost 150,000 such releases in 2006, and over 12,000 in September 2007, related to reductions in force alone.

In addition to these "mass layoff events," releases are standard in voluntary settlements of employment-related litigation, including litigation under the FMLA. Sound business judgment dictates that a business request a release of all employment-related claims as a condition of settling a suit brought under any of the myriad federal and state employment laws. The purpose of such a release is to protect the business from future litigation and to ensure the finality of the settlement agreement, while at the same time providing appropriate

remuneration and closure to the employee. For these same reasons, releases also are a common facet of early retirement and other voluntary separation programs.

In addition to general releases such as the one at issue in this case, businesses and employees frequently enter into releases to resolve specific claims, including claims under the FMLA. Such claim-specific releases are commonly utilized, for example, in *ongoing* employment relationships, where the employer and employee wish to settle a particular dispute but do not desire to end their relationship. The availability of both general and specific releases thus benefits businesses and employees by maximizing the avenues for settling employment-related disputes on mutually favorable terms.

In sum, businesses and employees execute countless releases that encompass FMLA claims each year as part of reductions in force, private settlements, and voluntary separation programs.

2. The Fourth Circuit's rule throws all of these releases into legal limbo. The Fourth Circuit held that releases of FMLA claims are invalid unless approved by a court or the Department. Pet. App. 31a. Even assuming that this qualification on the Fourth Circuit's rule is appropriate, *but see infra* Part II(3), there is currently no administrative mechanism in place to obtain such approval. As the Department has explained, "[t]he Department has never established a system for reviewing FMLA settlements in which no administrative complaint has been filed." Br. of the Secretary of Labor as *Amicus Curiae* In Support of Defendant-Appellee's

13,000 mass layoff actions affecting roughly 2.5 million workers. Employers offered many of these workers severance in exchange for a general release, in an effort to bring prompt closure to the relationship and provide transition assistance to affected families. The Fourth Circuit's ruling effectively handcuffs employers in the use of these termination programs by making releases significantly more tenuous.

In-house counsel seeking to protect clients from suit use waivers and releases to "close the book" on all workplace claims, known or unknown, as of a certain date. Partial releases are of less value to employers and, consequently, may be expected to provide the employee with less consideration. As a practical matter, uncertainty concerning whether and how FMLA claims can be resolved will discourage many employers from resolving ***any*** legal claims stemming from family and medical leaves. Some ACC members have confirmed their clients already are refraining from settling claims because of these concerns; others are contemplating reduction of severance benefits offered in exchange for releases.

In sum, uncertainty as to the value of FMLA releases will likely result in increased workplace litigation, in particular with respect to ADA and FRD litigation. By comparison, a return to the clarity and apparent certainty as to the validity of FMLA releases which existed prior to the ruling below would encourage enhanced separation packages designed to

eliminate the risk of litigation, and will not foster ADA and FRD litigation.

2. Since Most Employees Are Eligible and Likely to Use FMLA Leave, Certainty Concerning the Process to Resolve Disputed FMLA Claims Is of Growing Importance to Business.

More than half of all individuals working in the United States are eligible for FMLA leave. A significant number of workers also have chronic health conditions. A National Association of Manufacturers survey reported that "25 percent of those eligible for FMLA leave had medical certifications on file for 'chronic' illness that permitted unannounced, unscheduled intermittent leave." A survey by the U.S. Chamber of Commerce found "[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time." One company noted that 44 percent of its employees in one of its divisions had medical certifications and another one of its business groups saw a jump in medical certifications from 28 percent in 2005 to 42 percent in 2006. *Family and Medical Leave Act Regulations: A Report,* 72 Fed. Reg. 35549, 35622-26 (June 28, 2007) (citations omitted).

Employee awareness and use of FMLA appears to be increasing significantly. While 1999 survey data estimated that between 2.4 million and 6.1 million employees took FMLA leave each year, in 2005, that

number was "more likely to be between 6.1 million and 13 million." The trend of increased FMLA use is particularly strong in some industries. The Dallas Area Rapid Transit reported that employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006. The City of New York reported that use of FMLA leave has increased from 10.8% of all medical leaves in 2001 to 27% in 2006. The National Association of Manufacturers (NAM) reported that, for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years. NAM also reported that, for this one major auto parts manufacturer, the use of intermittent leave increased five times more quickly than that for regular FMLA leave. *Id.* at 35623-26 (citations omitted). The trend toward increased FMLA usage, and increased FMLA litigation, makes the need to swiftly resolve the circuit conflict all the more pressing.[3]

[3] The DOL has conceded that "an area that may not have been fully anticipated [was] the prevalence with which unscheduled intermittent FMLA leave would be taken . . . by individuals who have chronic health conditions." About one quarter of all FMLA leave is taken intermittently and many employers report much higher rates. One company reported that 95% of FMLA leave requests were for intermittent leave, another reported 75%. Another reported that the number of intermittent leaves had grown almost 300% in one year. *Id.* at 35552, 35626.

3. Complexity Surrounding an Employer's Obligations Under the FMLA Leads to Many Disputed Claims, but the Circuit Conflict Impairs Employers' Willingness and Ability to Avoid Litigation.

That FMLA and other "leave management" issues raise thorny legal questions, which cry out for private settlement, is apparent. Many complex questions perplex employers attempting to discern their employees' rights and their own obligations. Among those frequently cited are the scope and nature of: 1) penalties under this Court's ruling in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002); 2) what constitutes a serious health condition; 3) unscheduled intermittent leave; 4) employee rights to receive notice of their FMLA rights; 5) employee obligations to provide employers notice of their need for FMLA leave; 6) medical certification and verification; 7) the interplay between the FMLA and ADA; 8) transfers to an alternative position; 9) substitution of accrued paid time for unpaid FMLA leave; and 10) joint employment.

The interplay between FMLA and ADA, in particular, raises many additional complex issues, including: a) the interaction of the FMLA employee notice provisions and the ADA medical inquiry prohibitions; b) processes to obtain medical information under the FMLA and ADA; c) processes to follow under the FMLA and ADA to confirm an employee's fitness to return to work after FMLA leave; d) employee rights and obligations when employers offer

light duty, modified duty or transfers and reassignments under the FMLA and ADA; and e) permitting "reasonable leave for medical circumstances" under the FMLA and ADA.

In its conclusions regarding a July 2007 survey on the FMLA and its impact on organizations, the Society for Human Resource Management observed:

> Although certain provisions of the FMLA are favorable for both employees and employers, HR professionals have struggled with certain aspects of the FMLA, specifically those related to serious health conditions, intermittent use of leave and chronic or episodic conditions. Tracking/administering intermittent FMLA leave and determining whether an intermittent serious health condition should be protected by the FMLA were among the most difficult FMLA-related activities for organizations to administer. When HR professionals were asked to elaborate on FMLA requests that they believed were not legitimate, a number of comments were related to problems with administering intermittent leave and questioning the timing of intermittent leave.

Society for Human Resource Management, *FMLA and Its Impact on Organizations* 31 (2007).

The aforementioned statistics and trends, and the breadth of FMLA and related leave issues confronting employers, illustrate an undeniable reality – the FMLA, and "leave management" generally, is

steeped in legal nuances. This clash – between increased use of FMLA leave and the increased uncertainty surrounding employees' rights to take leave and employers' obligations to provide such leave – is at the heart of a rapidly growing number of disputed claims. These claims have been frequently resolved through private settlements and releases, thereby avoiding adding to the employment cases filling court dockets. The uncertainty created by the Fourth Circuit's decision, as to the ability of employers and employees to resolve such claims without litigation, renders them incapable of entering into effective settlements that are desired by both employers and their employees.

4. The Uncertainty Stemming From the Fourth Circuit's Ruling Promotes Disparate Treatment Within Corporate Workforces.

Some in-house counsel employed by the many companies operating in both the Fourth and Fifth Circuits feel compelled to use different separation or settlement agreements in different locations. There are obvious inequities in such an approach. For example, two FMLA-eligible employees performing the same job for the same rate of pay, and whose employment is being terminated for the same reason (as might be the case if a company engaged in a nationwide reduction in force), might be asked to execute different waivers merely because they live in different federal jurisdictions. To an employee untrained in FMLA

waiver jurisprudence, these disparities might be viewed as unlawful discrimination. From an employee's and manager's perspective, there is but one FMLA, and the rules regarding waiver of FMLA rights ought to be uniform regardless of where the employee works.[4]

As the Secretary of Labor proclaimed in her *amicus curiae* brief in support of Progress Energy's motion for reconsideration en banc below, "The consequences of the decision would be disastrous both for employers who want to settle claims with finality and for employees who want to obtain the compensation due to them promptly, without filing a lawsuit or seeking Department 'supervision.'" Brief for the Secretary of Labor as Amicus Curiae in Support of Appellee's Petition for Rehearing En Banc, at 4, *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005) (No. 04-1525).

[4] Even those employers which utilize different agreements based on the Circuit in which the workplace is located may be unsuccessful in their efforts to avoid litigation, in that an employee working in one jurisdiction may nevertheless be capable of bringing an action against his or her employer in any of several jurisdictions. *See* 28 U.S.C. § 1391(b) and (c).

B. The Fourth Circuit's Decision Below Calls Into Doubt Employers' Ability to Rely Upon an Agency's Interpretation of Its Own Regulations.

Given short shrift by the panel majority in the Fourth Circuit's ruling below was the Secretary of Labor's interpretation of the regulation at issue. The court of appeals did not have the benefit of that interpretation when the initial ruling was rendered, and attempted to divine the agency's interpretation from the absence of express guidance. In response thereto the Secretary took the extraordinary step of appearing and filing an *amicus curiae* brief in support of Progress Energy's motion for reconsideration. The Secretary's grave concern over the impact of the court's construction of the regulation was reflected in the text cited above. In that *amicus curiae* brief, the Secretary clearly articulated the Department's interpretation, i.e., that the regulation at issue regulates *only* the prospective waiver of FMLA rights, not the retrospective settlement of FMLA claims.

With the benefit of the Department's interpretation before it, the issue before the Fourth Circuit changed, but only the dissenting panel member, Judge Duncan, acknowledged the significance of that development. "The course of this appeal was unexpectedly diverted, however, when the DOL rejected the analysis of *Taylor I* in its belated amicus brief supporting Progress Energy's petition for rehearing en banc . . . After such interposition, the question in the case was necessarily recast", citing *Auer v. Robbins,* 519 U.S.

452, 461 (1977). *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 463 (4th Cir. 2007) (Duncan, J., dissenting) [also quoted in Petition for a Writ of Certiorari, App. A at 18a, *Progress Energy, Inc. v. Taylor,* No. 07-539 (U.S. Oct. 22, 2007)].

The Nation's businesses struggle mightily in their efforts to comply with the FMLA. As set forth above, disputed claims are often resolved through settlement in order to avoid the expense, disruption and uncertainty of litigation. Similarly, businesses look to an administrative agency's regulations and interpretations thereof in order to evaluate the risk of an investigation or enforcement action initiated by an agency. While businesses may not concur with an agency's interpretation of a statute, they have been able to rely upon an administrative agency's interpretation of its own regulations to evaluate the likelihood of an agency enforcement action and mitigate legal risk in their employment practices. The Fourth Circuit's failure to afford appropriate deference to the Secretary of Labor's interpretation of the DOL regulation suggests that such reliance upon an agency's interpretation of its own regulations may be misplaced, and may not provide the "safe harbor" it was thought to offer in the past. Accordingly, review by this Court is appropriate to avoid such additional uncertainty.

CONCLUSION

Left unresolved, the conflict created by the Fourth Circuit's decision below will discourage employers and employees from resolving FMLA claims and related claims arising under other federal and state laws. Employers and employees attempting to follow the Fourth Circuit's direction to seek approval from the DOL or courts are likely to encounter frustration, as it appears likely that courts must deny jurisdiction due to the absence of a case or controversy, and that the DOL will decline to assist on the grounds that it lacks the process or resources to evaluate waivers. Review of the Fourth Circuit's ruling would help avoid these disruptive workplace challenges, and avoid imposition of an unnecessary burden upon the courts.

The Association of Corporate Counsel, as *amicus curiae,* respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Petition For Rehearing En Banc, at 14, *Taylor v. Progress Energy, Inc.*, No. 04-1525 (4th Cir. Aug. 16, 2007). Consequently, the *only* way that employers and employees can validate releases is for the employee to file a lawsuit and then seek judicial approval of the settlement or other agreement that contains the release.

This unnecessary regime, if permitted to stand, will impose substantial costs on employers, employees, and the judiciary, ultimately harming the very people that the Fourth Circuit's rule is intended to protect.

Most significantly, by undermining the certainty that releases are intended to provide, the Fourth Circuit's rule decreases the value of releases. This, in turn, reduces the amount in severance and other benefits that employers are willing to pay employees for releases. *See* Muniza Bawaney, Note, *Signed General Releases May Be Worth Less Than Employers Expected: Circuits Split On Whether Former Employee Can Sign Release, Reap Its Benefit, And Sue For FMLA Claim Anyway*, 82 CHI.-KENT L. REV. 525, 546 (2007) ("[T]he ruling of the Fourth Circuit creates a disincentive for employers to offer separation benefits at all, because of the potential risk of employees accepting benefits only to turn around and sue.").

The Fourth Circuit's rule, in other words, harms the very class of people that it is intended to protect. For example, businesses will continue to implement reductions in force as economic conditions dictate–but because the Fourth Circuit's rule devalues releases of employment-related claims, businesses invariably will reduce or eliminate the benefits offered to

affected employees. As a consequence, the many employees who face involuntary separation will be deprived of substantial payments that might mean the difference between financial security and financial peril. *See id.* ("[M]assive layoffs will still occur if the economy demands it, but because of the Fourth Circuit's decision many of these laid off employees will have to go without the fat severance checks they would have had."). This outcome is particularly harmful to the overwhelming majority of employees who have no valid FMLA claim and who thus cannot recoup this lost value through FMLA litigation. For these employees, like all others, cannot, at the time of separation, provide the employer with certainty that they will not bring an FMLA claim in the future.

This devaluation of releases and the attendant harm to both businesses and employees extends beyond the reduction in force context. Under the Fourth Circuit's holding, *every* release that might encompass an FMLA claim–whether executed at the end of employment or during an ongoing relationship between the employer and employee–is subject to the approval requirement. The Fourth Circuit's rule thus diminishes the value of releases in *all* contexts, including reductions in force, private settlements, and voluntary separation programs, to the mutual detriment of employers and employees who desire to enter into such releases.

This harm to employers and employees cannot adequately be mitigated by the possibility of obtaining judicial approval of the release. In order to obtain such approval, the employee must file a lawsuit against the employer and create a live case or

controversy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This, however, will itself impose significant costs on both the judiciary, on the one hand, and employers and employees, on the other, thus further decreasing the value of releases and their attendant benefits.

First, lawsuits seeking approval of releases might well overwhelm the federal judiciary's already crowded docket. For example, the most recent available data shows that a total of 326,401 criminal and civil actions were filed in federal district courts in the fiscal year ending September 30, 2006, for a total of 464 weighted filings per authorized judgeship. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 13, 28 (2006), *available at* http://www.uscourts.gov/judbus2006/contents.html (last visited Nov. 19, 2007). Given the almost 1.5 *million* separations due to mass layoffs *alone* in 2006, it is not difficult to predict the impact that the Fourth Circuit's rule would have on the judiciary's caseload.

Second, seeking judicial approval will impose significant litigation costs on employers and employees. In order to obtain court approval, an employee might feel the need to hire an attorney to file a lawsuit, and an employer would have to do likewise to defend it. This is obviously not costless and may, in fact, be so costly as to compel parties to forego releases altogether, particularly given the relatively small size of many severance packages and other benefits ordinarily exchanged for releases. In this case, for example, Ms. Taylor received approximately $11,718 in severance benefits in

exchange for her release. The litigation costs of judicial approval of a release of this size might well offset the value of the release entirely.

In short, because court approval is the only currently available mechanism for validating a release, the value of such a release to employers–and, hence, the amount that they will give employees in exchange for a release–is greatly diminished. This harm is particularly unwarranted given that it will also affect employees who never seek to assert an FMLA claim but nonetheless will be required to bear the financial burden created by the Fourth Circuit's rule, in the form either of reduced benefits received in exchange for a narrower release or of the costs of compliance connected with providing employers with a release that encompasses FMLA claims. Nothing in logic or law supports this untoward result.

3. In its opinion below, the Fourth Circuit expressed "confiden[ce]" that the Department would be able to remedy this state of affairs by adopting a new regulatory regime to quickly and efficiently approve releases. Pet. App. 16a. With all due respect, the Fourth Circuit's "confidence" is misplaced. In the first place, it is not at all clear that the Department will adopt the new regulatory regime envisioned by the Fourth Circuit. Moreover, even if the Department did elect to create such a regime, it would come at enormous cost to the federal government, employers, and employees.

First, it is not at all certain that the Department will undertake a new and burdensome regulatory regime given the limited resources available to it. Although the Fourth Circuit suggested that the Department's "broader experience in supervising

FLSA settlements" will minimize the burdens of the FMLA supervision regime, *id.* 16a, in fact, the opposite is true. In 2006, for example, the Department's Wage and Hour Division concluded 31,987 FLSA cases. *See* U.S. Dep't of Labor, Employment Standards Division, 2006 Statistics Fact Sheet, *available at* http://www.dol.gov/esa/whd/statistics/200631.htm (last visited Nov. 19, 2007). Given the 1.5 *million* separations due to mass layoff events in the United States each year, the increased burden on the Department would seem substantial indeed. Moreover, the Department's funding already takes into account its obligation under this Court's precedents to superintend certain FLSA releases–but, by contrast, the Department's funding does not contemplate a regulatory regime for approving FMLA releases. Thus, as the Department itself noted, the Fourth Circuit's approval rule "would . . . require the Department to reallocate significant resources that are currently used to investigate FMLA and other labor standards complaints." DOL Brief I, at 3.

Given this additional burden, the Department may well decide not to adopt the new regulatory regime called for by the Fourth Circuit. Nor, of course, could the Fourth Circuit require it to do so, since "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA" or the organic law that the agency is charged with enforcing. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). And, in any event, as the foregoing demonstrates, the financial burden that

this new regulatory regime would impose upon the federal government would be substantial.

Second, even if the Department did implement this costly new regulatory bureaucracy, those regulations would still impose significant unnecessary costs on employers and employees, all for no obvious purpose. The thousands upon thousands of releases and settlement agreements entered into each and every year, including agreements between businesses and employees in ongoing employment relationships, would now face a new regulatory requirement–one that requires such agreements to be submitted to and cleared by a regulatory agency before they can take effect. As any regulated entity can attest, the costs of complying with new regulatory obstacles is substantial indeed. And these costs will, again, ultimately decrease the value of releases and the attendant benefits for *all* employers and employees, regardless of whether the individual employee executing the release has a colorable FMLA claim.

In short, regardless of whether the Department adopts the regulatory regime suggested by the Fourth Circuit, the costs that the Fourth Circuit's rule would impose on the federal government, the federal judiciary, employers, and ultimately, employees, is substantial. This Court therefore should intervene to prevent these costs from being imposed on the national economy, all to the ultimate detriment of the very people that the Fourth Circuit's rule seeks to protect.

4. The Fourth Circuit appears to suggest that the Department can avoid these costs by amending its regulation to say what the Department already believes that it says. *See* Pet. App. 17a n.4 (noting

"that the DOL appears to have section 220(d) under consideration in connection with its rulemaking responsibilities under the FMLA"). This is simply not true. The Department has not yet proposed an amendment, and the adoption and implementation of any such amendment could be delayed for years by the rulemaking process and the resolution of any ensuing challenges under the Administrative Procedure Act ("APA"). For example, litigants like Ms. Taylor might well seek to challenge the retroactive application of this hypothetical amendment to the thousands of releases already executed, thus increasing the uncertainty surrounding these extant releases. *See* 5 U.S.C. 551(4) (defining a "rule" as "the whole or a part of an agency statement of general or particular applicability *and future effect*" (emphasis added)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not . . . be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

Consequently, for the foreseeable future, employers and employees will continue under the legal cloud engendered by the Fourth Circuit's opinion. Not only will businesses and employees be left to languish in the uncertain legal milieu created by the Fourth Circuit's holding, but the scope and effect of tens (if not hundreds) of thousands of agreements containing employment-related releases also will be held in doubt. And if the eventual hypothetical amendment to the Department's regulation is not retroactively applied, a substantial portion of these agreements

will remain subject to the Fourth Circuit's erroneous rule.

5. These problems are only exacerbated by the split of authority between the Fourth and Fifth Circuits and the confusion among the district courts. *See* Pet. 11. Thousands of businesses, including many Chamber members, operate in multiple jurisdictions and do not know which of the Fourth and Fifth Circuits' divergent rules to follow. Additionally, because FMLA suits may be filed in multiple venues, including the employer's state of incorporation and places of business, *see* 28 U.S.C. 1391(b)(1) & (c), this split of authority creates a significant risk of intra-company forum shopping by employees whose previously resolved claims remain actionable in the Fourth Circuit but are barred elsewhere.

Consequently, this Court's immediate attention is warranted in order to prevent the significant negative impact that the Fourth Circuit's erroneous rule will exert on the federal government, the federal judiciary, employers, and ultimately, employees, and the attendant costs that it will necessarily impose on the national economy.

II. THE FOURTH CIRCUIT'S RULING IS FUNDAMENTALLY WRONG.

In addition to imposing significant costs on the national economy, the Fourth Circuit's rule is fundamentally flawed. It violates the strong public policy articulated by Congress and this Court in favor of private settlements of federal employment claims. It also violates fundamental principles of administrative law. These reasons further confirm

the necessity of this Court's immediate review of the Fourth Circuit's erroneous decision.

1. Federal law long has embodied a policy of encouraging private settlements of federal employment claims and, thus, of enforcing releases of such claims between businesses and employees. This Court has held, for example, that disputes under the Age Discrimination in Employment Act ("ADEA") "can be settled . . . without any . . . involvement" from administrative agencies or courts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Similarly, although "there can be no prospective waiver of an employee's rights under Title VII . . . presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). Indeed, "[i]n enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (stating that Congress intended "voluntary action" to be the "preferred means of achieving the objectives of Title VII").

Lower federal courts have followed suit. The courts of appeals have consistently encouraged private settlements of federal employment claims and have routinely upheld unsupervised releases of such claims. *See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) ("Courts have, in the employment law context, commonly upheld releases given in exchange for additional benefits. Such releases provide a means of

voluntary resolution of potential and actual legal disputes, and mete out a type of industrial justice. Thus, release of past claims have been honored under [Title VII and the ADEA]."); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("[A]n employee may agree to waive Title VII rights that have accrued."); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (collecting cases upholding the unsupervised settlement of ADEA claims); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1041-43 (6th Cir.) (en banc) (upholding unsupervised release of ADEA claim), *cert. denied*, 479 U.S. 850 (1986). This approach to federal employment claims comports with the broader federal policy of encouraging the private settlement of disputes rather than forcing resort to costly litigation. *See* Bawaney, *supra*, 82 CHI.-KENT L. REV. at 525 (noting the "general public policy favoring the post-dispute settlement of claims").

The Fourth Circuit's decision thus stands in opposition to the federal policy favoring private resolution of federal employment claims. In occupying this position, the Fourth Circuit not only made FMLA claims virtually unique to federal law, but it also severely undercut the ability of businesses and employees to use the most cost-effective means for resolving disputes, namely negotiated settlements. *See id.* at 545-48 (discussing how the Fourth Circuit's rule discourages FMLA settlements to the mutual detriment of businesses and employees); *see also* Rachel H. Yarkon, Note, *Bargaining in the Shadow of Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising From Termination of Employment*, 2 HARV. NEGOT.

L. REV. 165, 168-72 (1997) (discussing the benefits to both parties of a negotiated settlement in the employment discrimination context); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-51 (1994) (listing a number of benefits ranging from party satisfaction to cost-savings that result from settlement agreements); David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 122 (1983) ("[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed.").

2. The Fourth Circuit's holding is not justified by analogy to the Fair Labor Standards Act (FLSA). The FLSA is unique among federal employment statutes in prohibiting the retrospective release of certain claims absent Department or court approval. *See D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-15 (1946); *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 706-07 (1945). That is why federal courts have *refused* to extend its approval rule to any other employment laws. *See Gilmer*, 500 U.S. at 28; *Alexander*, 415 U.S. at 52; *Rivera-Flores*, 112 F.3d at 11; *Runyan*, 787 F.2d at 1041-43.

In approving the idiosyncratic supervision rule for certain FLSA releases, this Court noted that "[n]either the statutory language, the legislative reports nor the debates indicates that the question at issue [*i.e.*, release of the claim for liquidated damages under the FLSA] was specifically considered and resolved by Congress." *Brooklyn Sav.*, 324 U.S. at 705-06 (footnotes omitted). Instead, the Court "resort[ed] to a broader consideration of the

legislative policy behind" the FLSA. *Id.* at 706. According to the Court, "the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage." *Id.* at 707 n.18; *see also Gangi*, 328 U.S. at 116. Based upon this unique policy consideration, the Court effectively adopted a presumption that releases of certain claims under the FLSA were necessarily the product of unequal bargaining power and, therefore, that Congress intended altogether to prohibit such releases notwithstanding its silence on the matter. *See Runyan*, 787 F.2d at 1041-44.

The Fourth Circuit's extension of this approach to the FMLA was improper. The FLSA's minimum wage and maximum hour protections are, by definition, intended to protect the lowest paid and most vulnerable segment of the workforce. But this rationale is entirely inapplicable to laws, like the FMLA, that broadly apply to *all* segments of the workforce, no matter how powerful, highly paid, or well-educated. This is why the federal judiciary has repeatedly refused to extend the rationale of these cases to the ADEA, Title VII, or, for that matter, any other federal statute. *See Gilmer*, 500 U.S. at 28; *Alexander*, 415 U.S. at 52; *Runyan*, 787 F.2d at 1041-43.

In *Runyan*, for example, a panel of the Sixth Circuit employed reasoning similar to that relied on by the court below to conclude that the fact that the ADEA expressly references the FLSA's enforcement scheme warranted the extension of the FLSA's

supervision rule to the ADEA. *See* 787 F.2d at 1040. The en banc court, however, reversed the panel's ruling, explaining that "[t]he purposes behind enactment of the ADEA and the earlier enactment of the FLSA are . . . obviously different." *Id.* at 1043. The en banc court thus endorsed the practice of "effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement." *Id.* It did so, moreover, even though "Congress, by referring to the FLSA enforcement provisions in enacting the ADEA, was aware of the judicial interpretation of the FLSA" creating the supervision rule. *Id.* at 1044.

As *Runyan* makes clear, there is simply no reason to presume, in the context of broad statutes like the ADEA, Title VII, and the FMLA, that releases are the product of unequal bargaining power. Instead, to the extent that any particular release is the product of such circumstances, it can be evaluated on a case-by-case basis pursuant to contract rules specifically adapted to that purpose. *See id.* at 1044-45 (noting that "courts should not allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching" and that "[o]rdinary contract principles would apply" to review of an ADEA release); *see also Faris*, 332 F.3d at 322 (holding that a court may invalidate an FMLA release where "the release was invalid because of fraud, duress, material mistake," or some other reason). But there is simply no reason to believe that in enacting the ADEA, Title VII, and the FMLA, Congress intended to *reverse* the strong public policy in favor of the private settlement of employment-related disputes. Indeed, as

explained above, the federal judiciary has repeatedly found to the contrary.

Consequently, the Fourth Circuit's rule simply cannot be supported by analogy to this Court's cases construing the unique policy underlying the FLSA.

3. The Fourth Circuit's ruling likewise violates basic principles of administrative law. The federal courts are required to defer to an agency's reasonable interpretation of its own regulations unless contrary to their clear and unambiguous text. *See Auer*, 519 U.S. at 461 (holding that deference to the Department's interpretation of its own regulation is warranted unless that interpretation is "plainly erroneous or inconsistent with the regulation"); *see also Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2317 (June 11, 2007) (reversing a lower court's rejection of a "reasonable" legal construction advocated by the Department and another federal agency). Here, however, not only did the Fourth Circuit reject the Department's interpretation of Section 220(d), but it went on to adopt an interpretation that is contradicted both by the regulation's text and the Department's longstanding regulatory practice.

The Department reasonably interpreted Section 220(d) as reflecting the well-established "distinction between" a forward-looking "right" and a backward-looking "claim." *DiBiase*, 48 F.3d at 729; *Faris*, 332 F.3d at 321 ("A plain reading of [section 825.200(d)] is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims."). This distinction, for example, forms the basis of this Court's rule prohibiting prospective waivers of rights but not retrospective releases of claims under Title VII. *See Alexander*, 415 U.S. at 52; *see also* 29 U.S.C. 626(f)

(prescribing a "knowing and voluntary" standard for retrospective waivers and releases of an ADEA "right or claim").

The Fourth Circuit, however, while purporting to ground its rejection of the Department's interpretation of Section 220(d) on the regulation's plain and unambiguous text, went on to engraft upon that regulation a qualification that is inconsistent with both that text and the Department's consistent regulatory practice. In particular, the Fourth Circuit did not adhere to the logic of its textual analysis and interpret Section 220(d) as completely "prohibit[ing] both the prospective and retrospective waiver of any FMLA right." Pet. App. 31a. Instead, it held that Section 220(d) "prohibits both the prospective and retrospective waiver of any FMLA right ... *unless the waiver has the prior approval of the [Department] or a court.*" *Id.* (emphasis added).

But this latter qualification is flatly inconsistent with the plain text of Section 220(d), which, without exception or qualification, provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). Either, as the Fourth Circuit's textual analysis implies, this text prohibits *all* waivers and releases of FMLA rights and claims, or, as the Department believes, it draws a distinction between a forward-looking "right" and a backward-looking "claim," with the regulation's prohibition extending only to the former. There is, however, no textually plausible middle ground, pursuant to which the regulation prohibits *all* waivers and releases of *any* right or claim *unless the Department or a court says otherwise.*

Moreover, the Fourth Circuit's interpretation of Section 220(d) is contrary to the Department's consistent application of that section since the day that it was promulgated in 1996. As discussed above, although the Department has adopted a procedure for approving certain FLSA releases, it pointedly has *not* adopted a similar procedure for FMLA releases, for the obvious reason that it never believed that such approval was necessary. Nor has the Department ever challenged the validity of a release that might encompass an FMLA claim in court on the ground that agency or judicial approval was required. It is thus clear through its historical practice that the Department has long *rejected* the interpretation of Section 220(d) adopted by the Fourth Circuit. *See, e.g., INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 190-91 (1991) (deferring to an agency construction of a regulation in part due to "the absence of any evidence" that the agency had applied the regulation in a manner consistent with the contrary construction).

Needless to say, it violates the most basic principles of administrative law for a federal court to reject an agency's interpretation of its own regulation in favor of one that is flatly inconsistent with both the regulation's plain text and longstanding agency practice. Consequently, in addition to all the other reasons supporting certiorari in this case, this Court's intervention is needed to correct the Fourth Circuit's manifestly erroneous understanding of basic principles of administrative law.

4. The decision below threatens to eviscerate not only the ability of employers and employees amicably to resolve their FMLA disputes, but also their ability

to utilize releases to capture mutual benefits in involuntary and voluntary separation programs. In so doing, the lower court's decision contravenes the settled policy of Congress and this Court favoring the private settlement of federal employment claims over resort to wasteful litigation, and violates fundamental principles of administrative law. Because the Fourth Circuit's erroneous holding imposes significant costs on the federal government, the judiciary, employers, and ultimately, the employees whom its rule is presumably intended to help, this Court's review is immediately warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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